

REMARKS

Claims 1-14, 16-17, 19-20, 22-24, and 36-40 constitute the pending claims in the present application. Claims 25-33 are withdrawn. Claims 15, 18, 21 and 34-35 have been cancelled. Claims 1-3, 8-12, 17, and 36-40 are rejected under 35 U.S.C. 102(b) as being anticipated by Green et al. U.S. 5,579,978 ("Green"). Claims 4-7, 13-14, 16, 20 and 22-24 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claim 19 was indicated as rejected in the Office Action Summary, but was not addressed by the Examiner's remarks. Applicants remind the Examiner that MPEP §707.07(i) requires that each pending claim should be mentioned by number and its treatment or status given.

Summary of Telephonic Interview

Applicants appreciate the time and attention of Examiner Ryckman during the telephonic interview of May 11, 2009. During the interview the rejections of the pending claims put forth in the Office Action of January 29, 2009 were discussed. In particular, Applicants presented arguments against identifications made by the Examiner between elements of Applicants' claim 1 and the apparatus described by Green. The Examiner acknowledged a number of points, and suggested submitting the arguments in writing to be included in the application file.

Issues raised in the Office Action will now be addressed below.

Claim Rejections – 35 U.S.C. §102(b)

Claims 1-3, 8-12, 17, and 36-40 are rejected under 35 U.S.C. 102(b) as being anticipated by Green. Applicants respectfully traverse the rejection.

Claims 1 and 10 recite a delivery device and system for delivering an implant to an anatomical site in a body of a patient. The device includes a handle; a shaft having proximal and distal ends and attached to the handle at the proximal end, the distal end having a curved section and the proximal end having a substantially straight section; a pusher tube slideably fitted over the shaft and extending from the handle distally along the substantially straight section of the proximal end of

the shaft; and a pushing mechanism operatively interconnected with the handle for actuating the pusher tube distally along the substantially straight section of the proximal end of the shaft to push the implant into the anatomical site, wherein the pusher tube is adapted to form an operative connection with the implant along the substantially straight section of the proximal end of the shaft. The system further includes an implant for being delivered to an anatomical site in the body of a patient.

No pusher tube slideably fitted over a shaft

Green does not teach or suggest, at least, a pusher tube slideably fitted over a shaft. In contrast, Green's apparatus for applying surgical fasteners includes "means for advancing the first jaw member towards the second jaw member to grip the tissue between the jaws" and "means for driving the fasteners into the tissue subsequent to positioning the jaws (sic) members in relation to each other by the advancement means" that are not tubes and that are not slideably fitted over a shaft (Green, col. 3, line 64-col. 4, line 5).

On page 2 of the Office Action, the Examiner interprets Green's cartridge jaw 22 and alignment pin advancement means 24 as "a shaft" and "a pusher tube slideably fitted over the shaft" as recited in Applicants' claims 1 and 10. But Applicants respectfully submit that this interpretation is incorrect in a number of respects. First, Green does not teach or suggest that the alignment pin advancement means 24 takes the form of a tube, which is defined as a "hollow cylinder" (Webster's II New College Dictionary, Third Edition, 2005). Instead, Green teaches that "pin advancement means 24 comprises an arm member which rides on top of driver 56 and terminates in an upturned portion to engage pin 62" (Green, col. 8, lines 46-49). In Green's Figs. 3 and 10, the alignment pin advancement means 24 is illustrated as a solid member with a rectangular cross section. Green provides no teaching or suggestion of the use of any tube within his device, and certainly not a tube as an alignment pin advancement means 24.

Moreover, Green's cartridge jaw 22 does not serve as a "shaft" over which a pusher tube is slideably fitted. The definition of the term "shaft" is "a long, usually cylindrical, bar" (Webster's II

New College Dictionary, Third Edition, 2005). Together with the definition of "tube" discussed above, this definition gives meaning to the relationship between the recited pusher tube and shaft, in which the pusher tube is "slideably fitted over the shaft" (e.g., as illustrated in Fig. 3 of Applicants' specification, in which shaft 14 slides into pusher tube 31). In contrast, as illustrated in Green's Figs. 3 and 10, the cartridge jaw 22 consists of two parallel solid plates having "a fastening cartridge ... positioned within" (Green, col. 6, lines 8-9). There is no teaching or suggestion in Green that the alignment pin advancement means 24 is "slideably fitted over" cartridge jaw 22. Nothing slides within Green's alignment pin advancement means 24, let alone cartridge jaw 22. Indeed, Figs. 3 and 10 suggest the opposite: that alignment pin advancement means 24 is positioned between the parallel plates of cartridge jaw 22.

Thus, for at least these reasons, Green's cartridge jaw 22 and alignment pin advancement means 24 do not teach or suggest "a shaft" or "a pusher tube slideably fitted over the shaft," as recited in Applicants' claims 1 and 10.

No pusher tube forming an operative connection with an implant

Claims 1 and 10 additionally recite "wherein the pusher tube is adapted to form an operative connection with the implant." On page 2 of the Office Action, the Examiner has incorrectly identified Green's alignment pin 62 as providing this "implant." Green teaches that "alignment pin 62 protrudes from cartridge 54 and aligns with an alignment hole ... in anvil jaw 20" to "insure proper alignment of cartridge 54 with anvil jaw 20 so that fastener means 66 are properly driven into position between the jaw members" (Green, col. 9, lines 1-5). After inserting the fasteners (as illustrated in Fig. 5), the Green device, including alignment pin 62, "is returned to the position shown in FIG. 2" (Green, col. 11, lines 1-4) and the device may be removed from the patient. Applicants respectfully observe that alignment pin 62 is withdrawn from the patient's body as the device is withdrawn, and therefore cannot possibly serve as an "implant" as the term is understood by one of ordinary skill in the art.

Indeed, the only object that can be said to be "implanted" by the Green device is the fastener means 66. However, the alignment pin advancement means 24 (which the Examiner has identified,

incorrectly we submit, as providing "a pusher tube adapted to form an operative connection with the implant") is distinctly described by Green as operating independently of the mechanism for driving fastener means 66. Specifically, Green teaches that "means for advancing the first jaw member towards the second jaw member to grip the tissue between the jaws are provided ... means for driving the fasteners into the tissue subsequent to positioning the jaws (sic) members in relation to each other by the advancement means is also provided, and the advancement means of the apparatus of the present invention is independent of the driving means" (Green, col. 3, line 64 – col. 4, line 7, emphasis added). Thus, even if the fastener means 66 are interpreted as "an implant," which Applicants do not concede, Green fails to teach or suggest that the alignment pin advancement means 24 are adapted to form an operative connection with any implant, as recited in claims 1 and 10. Indeed, Green's device teaches away from this feature.

Thus, for at least these reasons, Green's alignment pin advancement means 24 and neither alignment pin 62 or fastener means 66 teach or suggest "a pusher tube adapted to form an operative connection with the implant" as recited in Applicants' claims 1 and 10.

For at least the above reasons, Green fails to teach or suggest all of the elements in Applicants' claims 1 and 10, and thus fails to anticipate or render obvious these claims. Each of claims 2-3, 8-9, 11-12, 17 and 36-40 depend upon one of claims 1 and 10, and are thus allowable for at least the reasons described above, and moreso because of additional features recited therein. Applicants respectfully request the Examiner withdraw the rejection and allow the claims.

CONCLUSION

In view of the above remarks, Applicants believe the pending application is in condition for allowance.

Applicants believe no fee is due with this response other than as reflected on the enclosed Petition for Extension of Time. However, if a fee is due, please charge our Deposit Account No. 18-1945, under Order No. MIY-P01-024 from which the undersigned is authorized to draw.

Dated: May 26, 2009

Respectfully submitted,

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